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You are hereby notified that the Court has entered the following opinion and order:

2015AP1089-CR State of Wisconsin v. Marcus D. Williams (L.C. # 2013CF4682)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Marcus Williams appeals a judgment of conviction following a jury trial for first-degree reckless homicide by use of a dangerous weapon[1] and attempted armed robbery with the use of force,[2] challenging the denial of his motion to suppress evidence. After reviewing the briefs and

[1] WISCONSIN STAT. §§ 939.63(1)(b); 940.02(1) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] WISCONSIN STAT. §§ 939.32; 943.32(2).

the record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. For the reasons discussed below, we summarily affirm.

Williams was charged with the November 2005 first-degree reckless homicide and attempted robbery of James Alexander, who was shot and killed while seated in the passenger seat of his girlfriend's vehicle. Williams' alleged role in Alexander's homicide was revealed in 2013 when a fellow inmate at Columbia Correctional Institution, Jacarr Johnson, told prison officials that Williams confessed to having committed a homicide in Milwaukee in November 2005 and provided Johnson with details of the homicide. Prison officials contacted the cold case unit of the Milwaukee Police Department, which sent detectives to the prison to interview Johnson.

After interviewing Johnson, detectives interviewed L.Y., Alexander's girlfriend, who was an eyewitness to the crime. L.Y., who had previously been unable to identify the assailant from an array of photographs she reviewed in 2005 that did not include Williams' photograph, identified Williams from a photo array and an in-person line-up in 2013. Between the time during which detectives displayed the photo array and conducted the line-up, the detectives also interviewed Williams.

The transcript of the detectives' interview with Williams, who was in custody, indicates that following receipt and acknowledgment of the ***Miranda***[3] warnings, Williams made inculpatory statements, which will be discussed below. However, Williams soon thereafter invoked his right to counsel. Rather than halting the interview, the detectives continued to

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

question Williams and encouraged him to continue to provide information and to waive his right to counsel. Williams reconsidered and continued with the interview. Williams moved to suppress all of the statements he made pursuant to ***Edwards v. Arizona***, 451 U.S. 477 (1981). The circuit court denied the motion, holding that Williams "reinitiated the statement." A video recording of Williams' interview, with some redactions reflecting earlier court rulings, was played for the jury at trial.

The State "reluctantly" acknowledges that the circuit court likely erred in denying the motion to suppress as it relates to those statements Williams made after invoking his right to counsel, but argues that the error was harmless "[b]eyond a reasonable doubt."[4] To find that the constitutional error is harmless beyond a reasonable doubt, we must be convinced that a rational jury would have found Williams guilty had Williams' post-invocation statements not been admitted. *See* ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189. Assuming without deciding that the court should have suppressed all of Williams' statements made following his invocation of his right to counsel, we conclude on the record before us that the admission of the entire interview at trial was harmless beyond a reasonable doubt, and affirm the conviction. *See* ***State v. Harris***, 199 Wis. 2d 227, 256, 544 N.W.2d 545 (1996) ("Our task is to

[4] Williams does not distinguish between the pre-invocation of right to counsel and post-invocation portions of his statements and argues only that his statement should have been suppressed, presumably in its entirety. Williams does not dispute that he received his ***Miranda*** warnings, and frames the issue on appeal as whether the police should have terminated the interview after Williams unequivocally invoked his right to counsel. In his reply brief, Williams does not refute the State's argument that the pre-invocation portion of the statement is admissible and was properly before the jury; thus, we deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Our review considers only the pre-invocation portion of Williams' statement.

examine the erroneously admitted evidence and the remainder of the untainted evidence in context to determine whether the error was harmless.").

We begin our analysis by reviewing Williams' post-***Miranda*** and pre-invocation of counsel statements, which were properly before the jury. In response to the detective's advisement that the detectives wanted to speak to him about something that happened in 2005, Williams replied that he never should have told "Jacar[r]," whom he also referred to as a "snitch," and that he thought he could trust Jacarr. The detectives did not mention Jacarr's or anyone else's name prior to Williams' spontaneous statement naming "Jacarr." When the detective inquired what Williams had told Jacarr, Williams responded, "[W]hat he told you all man. I thought I could trust him."

Jacarr Johnson testified at the trial that he was playing cards at Columbia Correctional Institution when Williams approached him. Johnson explained that the playing cards, which were provided by the Department of Corrections, had pictures of "missing" homicide victims on the backs of them, and indicated that Williams asked to see them after Johnson was done with them. Williams told Johnson to let him know if he came across a card bearing James Alexander's likeness. When Johnson asked Williams why he wanted to know, Williams responded that it was due to "a secret that [Williams is] going to take to the grave." Johnson testified that Williams eventually told him that Williams planned to rob Alexander as Alexander sat in a truck, and ended up shooting into the rear passenger window as the truck drove off. Williams advised Johnson that he saw on the news the following day that Alexander was dead. Johnson also provided background information regarding the general location of the crime scene and a gathering of people that included the person, Alexander, that Williams targeted for the intended robbery, as well as the details that Williams tapped on the window, that Williams heard

a scream telling the driver to "smash off," and that the car quickly drove away. Near the close of his testimony, Johnson testified that very soon after the conversation, he notified a prison official that he had information about a 2005 Milwaukee homicide, and that prison officials contacted the Milwaukee police. Johnson acknowledged that he was seeking a sentence reduction in return for his information and cooperation.

L.Y. testified that on the date of Alexander's homicide, she and Alexander gathered with other Alexander family members at a shop to examine a car that Alexander's father was refurbishing for racing, and stood outdoors in a group afterward. Upon leaving, L.Y. was in the driver's seat of her Ford Explorer truck with Alexander as the passenger, waiting to back out of her parking space when she heard a knock on the passenger side front window. Alexander told her to pull away, which she did. When L.Y. heard the knock, she looked over and saw an unmasked man at the window. L.Y. testified she got a good look at the man and proceeded to identify Williams in the courtroom. L.Y. stated that when she took off, she heard a gunshot and the breaking of the back passenger side window.

L.Y. testified that in 2013 she was shown a photo array and also observed a line-up so that she could review voices. L.Y. indicated that on both occasions, she picked Williams as the perpetrator. L.Y. also testified that she was "positive" in her identification of Williams. On cross-examination, L.Y. acknowledged that in 2006 she had advised a detective who approached her to have her view some photographs that she had not seen the perpetrator's face, and therefore, that there was no use in reviewing any photographs. On redirect, L.Y. explained that she had told the detective there was no reason to look at the photographs because she feared that the perpetrator might come and hurt her. L.Y. reiterated that she had gotten a "good look" at

Williams' face, and declared that she would never forget it. Finally, L.Y. testified that there was no question in her mind that Williams shot Alexander.

The Milwaukee Police Department detective who displayed the photo array to L.Y. in 2013 testified that when L.Y. first looked at the photograph of Williams in the array, L.Y. said, "'This looks like the guy,' and became emotional." L.Y. then indicated that she was "not 100 percent positive, and wanted to hear him speak." The detective put together an in-person line-up so that L.Y. could listen to Williams speak. Another detective, who was seated near L.Y. as she observed the line-up, testified that when Williams walked into the line-up room, L.Y. "became visibly shaken … very upset, very emotional." The prosecutor then played a video recording of L.Y.'s reaction for the jury. After L.Y. once again identified Williams as the assailant, the detective inquired whether L.Y. was sure of her identification. The detective testified: "She said that she was positive that it was [Williams]…. [S]he described some of the facial features and was a hundred percent sure when she heard the voice."

Several other law enforcement officers, as well as the medical examiner and Alexander's father, also testified at trial. Our review, however, focuses primarily on Williams' pre-invocation of counsel statements, Johnson's testimony, and L.Y.'s testimony and identification of Williams as most critical to our harmless error analysis. In determining that the error in admitting Williams' post-invocation statements is harmless beyond a reasonable doubt, we have considered the importance and frequency of the error, the presence of corroborating and contradicting evidence, whether the improperly admitted evidence duplicates untainted evidence, the nature of the defense, and the strength of the State's case. *See* ***State v. Rockette***, 2005 WI App 205, ¶26, 287 Wis. 2d 257, 704 N.W.2d 382.

Williams' post-***Miranda***, pre-invocation statements strongly imply both that Williams had told Johnson about his involvement in Alexander's homicide and that what Johnson told the detectives accurately reflected Williams' prison statement to Johnson. It is notable that after one of the detectives advised Williams that they wanted to talk to Williams about something that happened in 2005, Williams immediately described Johnson by name and as a "snitch," without the detectives having mentioned Johnson's name. Williams' statement is powerful corroboration of Johnson's trial testimony.

Johnson's testimony included detailed background information describing the location of Alexander's homicide and Williams' observation of a group of people standing together, and a detailed description of what then took place. Johnson's testimony is also corroborated by L.Y.'s testimony that family members gathered in a group after examining a racing car, that Williams tapped on the window, that Alexander yelled out that L.Y. needed to drive quickly, and that they drove away as quickly as possible.

Finally, L.Y.'s identification testimony at trial was unwavering. When shown a photo array in 2005 that did not include a photograph of Williams, L.Y. indicated that no photograph matched the assailant. When shown the photo array in 2013 that included a photograph of Williams, L.Y. indicated she believed Williams' photograph to be that of the assailant, but asked to hear his voice because that would permit her to be certain as to identification. At the line-up at which the participants were required to speak, L.Y. indicated she was positive that Williams was the assailant, and an observing detective noted L.Y.'s visceral reaction to hearing Williams' voice. Although challenged by the defense with regard to her 2006 statement that she had not seen the assailant's face, L.Y. provided a plausible explanation for her reluctance to participate

in the investigation and remained steadfast in her assertion that she was positive Williams was the assailant.

No doubt, a video recording of the defendant confessing guilt is powerful evidence. However, we are confident that, had the jury seen only those admissible portions of Williams' statement that preceded his invocation of his right to counsel, the jury would have been persuaded that the testimony they heard from Johnson was accurate. Williams' pre-invocation statements were highly inculpatory and can be readily interpreted to confirm Johnson's testimony. Johnson's testimony included details that would presumably only have been known by an eyewitness such as Williams, details that were confirmed by L.Y.'s testimony concerning events preceding and during the homicide and attempted robbery. Therefore, the inadmissible portions of Williams' statement were largely cumulative of the testimony Johnson gave describing Williams' confession to him.

L.Y.'s identification testimony was strong and was corroborated by the emotional reactions she exhibited both when viewing the photo array and the line-up. When L.Y.'s confidence in her identification of Williams following display of the photo array was not "100 percent positive," L.Y. requested that she be permitted to hear Williams speak. L.Y.'s request is indicative of her dedication to ensuring certainty in her identification of Williams. Upon hearing Williams' voice, L.Y. indicated she was "a hundred percent sure" that Williams was Alexander's assailant.

The State's case against Williams, even in the absence of Williams' post-invocation statements, was strong. The defense focused primarily on challenging L.Y.'s identification of Williams and Johnson's credibility, and offered no witnesses of its own.

Viewing all of the tainted and untainted evidence in context, we are convinced that it is clear beyond a reasonable doubt that absent the tainted evidence a rational jury would have convicted Williams of both offenses, and that the error did not contribute to the jury's verdict. *See* ***Harvey***, 254 Wis. 2d 442, ¶46. We conclude that any error was harmless.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals